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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

20 Cung Le, Nathan Quarry, Jon Fitch, Brandon  
21 Vera, Luis Javier Vazquez, and Kyle Kingsbury  
22 on behalf of themselves and all others similarly  
situated.

23 Plaintiffs,  
v.

25 Zuffa, LLC, d/b/a Ultimate Fighting  
Championship and UFC,

26 || Defendant.

Case No.: 2:15-cv-01045-RFB-(PAL)

**ZUFFA, LLC'S RESPONSIVE  
BRIEF REGARDING THE  
STANDARDS TO BE APPLIED FOR  
THE EVIDENTIARY HEARING ON  
CLASS CERTIFICATION**

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## INTRODUCTION

In its opening brief, Zuffa, LLC (“Zuffa”) showed that binding Supreme Court and Ninth Circuit cases require this Court to conduct a “rigorous” review of the evidence Plaintiffs have proffered to meet their burden of proving each of the elements required by Federal Rule of Civil Procedure 23. ECF No. 634. Where the issue relates to a Rule 23 requirement, moreover, if there is a battle of the experts, the Court is to determine which side is more persuasive. In conducting that review, this Court must carefully evaluate that evidence to determine not just whether it meets minimal standards of admissibility, but whether it is sufficiently persuasive to meet that burden. And that is so even if it requires the Court to decide issues that also go to the merits.

11 By contrast, much of Plaintiffs' brief is devoted to rehashing class certification  
12 arguments that have already been briefed. ECF No. 633. For example, Plaintiffs argue again  
13 that courts routinely certify classes in antitrust litigation, though Plaintiffs still do not respond to  
14 the point that no court has ever granted class certification in a Section 2 coercion case or a  
15 monopsonization case like this one. Zuffa's Opposition to Plaintiff's Class Certification  
16 Motion, ECF No. 540 at 14. Similarly, Plaintiffs reiterate their argument that this Court can  
17 conclude that Rule 23(b)'s predominance requirement is satisfied by focusing solely on the  
18 issue of liability without regard to common impact but fail to address the binding law to the  
19 contrary cited in Zuffa's Opposition. *Id.* at 19-21. Plaintiffs ignore that antitrust injury is an  
20 element that must be established for antitrust liability. *Am. Prof'l Testing Serv., Inc. v.*  
21 *Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 108 F.3d 1147, 1151 (9th Cir.  
22 1997); *Am. Ad. Mgmt. Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1990); *In re*  
23 *High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 567 (N.D. Cal. 2013). As one court has  
24 explained, "Common questions of fact cannot predominate where there exists no reliable means  
25 of proving classwide injury in fact. When a case turns on individualized proof of injury,  
26 separate trials are in order." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244,  
27 252-53 (D.C. Cir. 2013) (internal citation omitted); *see also Zinser v. Accufix Research Inst.,*  
28 *Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001), *opinion amended on denial of reh'g*, 273 F.3d 1266

1 (9th Cir. 2001) (“If each class member has to litigate numerous and substantial separate issues  
 2 to establish his or her right to recover individually, a class action is not ‘superior’”).

3 To the extent Plaintiffs have addressed the standards for analyzing Plaintiffs’ proffered  
 4 expert evidence, Plaintiffs’ arguments can be distilled to essentially three arguments: *First*,  
 5 Plaintiffs argue that, in order to meet their burden under Rule 23, Plaintiffs need only introduce  
 6 an expert opinion based on a “plausible methodology.” ECF No. 633 at 2-3. There is no basis  
 7 for this position and it is flatly refuted by Supreme Court and Ninth Circuit precedent cited in  
 8 Zuffa’s opening brief and summarized below. *Second*, Plaintiffs argue that, under *Amgen Inc.*  
 9 *v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455 (2013), and *Tyson Foods, Inc.*  
 10 *v. Bouaphakeo*, 136 S. Ct. 1036 (2016), Plaintiffs need only introduce admissible evidence from  
 11 their experts to meet their burden on Rule 23. ECF No. 633 at 3. This argument is another way  
 12 of phrasing Plaintiffs’ first argument, which misstates the limited holding in *Tyson* and *Amgen*  
 13 and once again ignores relevant precedent cited in Zuffa’s opening brief and summarized below.  
 14 *Third*, Plaintiffs argue that this court cannot assess the merits of Plaintiffs’ expert opinions  
 15 because to do so would make findings that would have a preclusive effect. *Id.* at 9. Plaintiffs  
 16 misstate the preclusive effect of the Court’s ruling on class certification.

## 17 ARGUMENT

### 18 I. This Court Must Apply The *Daubert*-plus Persuasiveness Test Enunciated 19 By The Ninth Circuit In *Ellis* And *Sali* Rather Than The Less Stringent Tests Plaintiffs Favor.

20 Plaintiffs wrongly urge the Court to evaluate their proffered expert evidence under a  
 21 plausibility standard which cannot be squared with the mandates of the Supreme Court in *Wal-*  
 22 *Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 569 U.S. 27  
 23 (2013), and of the Ninth Circuit in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir.  
 24 2011). Tellingly, Plaintiffs’ papers *do not even mention Wal-Mart* or *Ellis* and they cite to  
 25 *Comcast* only for basic, uncontroversial propositions of law without discussing its key holdings.  
 26 Binding decisions of both the Supreme Court and the Ninth Circuit require that the Court  
 27 evaluate Plaintiffs’ expert testimony employing a standard that is based not on admissibility  
 28 under *Daubert* but on rigorous analysis of its persuasiveness.

1 Plaintiffs also do not distinguish between issues left to the Court and issues that overlap  
 2 with the issues submitted to the jury. For example, Plaintiffs must show that all or virtually all  
 3 members of the class suffered antitrust injury, called common impact, an inquiry under Rule  
 4 23(b)(3). It is this Court that must determine whether Plaintiffs' experts have proven common  
 5 impact. ECF No. 540 at 12. Plaintiffs assert without citation that they must prove three things at  
 6 trial: (1) an "antitrust violation," (2) "classwide impact," and (3) "aggregate class damages."  
 7 ECF No. 633 at 1. No citation is possible for this assertion because "classwide impact" must be  
 8 proven with common evidence, is a separate requirement for predominance under Rule 23, and is  
 9 not part of the antitrust violation and damages that would be required at trial. It is thus an issue  
 10 for the Court, not the jury, to decide. Plaintiffs have cited no jury verdict form or instructions  
 11 stating otherwise.

12 A. Plaintiffs' Proffered "Plausibility" Standard Is Poorly Defined and Contrary to  
 13 Binding Ninth Circuit and Supreme Court Precedent.

14 Plaintiffs never clearly define what their "plausibility" standard entails, but even the  
 15 district court cases that they wrongly contend have applied such a test make clear that the relevant  
 16 test is not the same as or even "more lenient" than *Daubert*: in a battle of the experts over whether  
 17 the standards of Rule 23 are met, the Court is to determine who is persuasive. For example, *In re*  
*18 High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167 (N.D. Cal. 2013) ("High Tech IP"),  
 19 expressly stated:

20 this Court must determine not only the admissibility of expert evidence that forms  
 21 the basis of the methodology that demonstrates whether common questions  
 22 predominate. *Rather, this Court must also determine whether that expert evidence*  
*is persuasive*, which may require this Court to resolve methodological disputes.

23 985 F. Supp. 2d at 1187 (citing *Ellis*, 657 F.3d at 982) (emphasis added). Contrary to Plaintiffs'  
 24 contention that Judge Koh applied a "plausibility" standard, she actually declined to do so.  
 25 Although she noted in discussing the requisite burden of proof in demonstrating antitrust impact  
 26 that some pre-*Ellis* courts had applied such a standard, she also observed:

27 as explained by Judge Alsup in *In re Graphics Processing Units Antitrust Litigation*  
 28 ("In re GPU"), 253 F.R.D. 478 (N.D. Cal. 2008), even under a plausible  
 methodology standard, "certification [should not be] automatic every time counsel  
 dazzle the courtroom with graphs and tables." If the Court were to hold otherwise,

1       “nearly all antitrust plaintiffs could survive certification without fully complying  
 2       with Rule 23.”

3       *In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. at 567. Even for damages issues which do  
 4       go to the jury, Judge Koh also noted that in *Comcast* the Supreme Court “expressed concern that  
 5       Rule 23(b)(3)’s predominance requirement would be ‘reduce[d] … to a nullity’ if courts declined  
 6       to assess whether a plaintiff’s proposed methodology for measuring and quantifying damages on  
 7       a class-wide basis was ‘speculative.’” *Id.* at 567 n.6 (citing *Comcast*, 569 U.S. 35-36 (“Under  
 8       that logic, at the class certification stage *any* method of measurement [would be] acceptable so  
 9       long as it [could] be applied classwide, no matter how arbitrary the measurements may be”)).  
 10      Then, rather than adopting a “plausible methodology” test, Judge Koh stated that “The Court  
 11     believes that conducting a thorough review of Plaintiff’s theory and methodology is consistent  
 12     with the requirement that the Court conduct a ‘rigorous analysis’ to ensure that the predominance  
 13     requirement is met.” *Id.* at 567. Similarly, in *In re Cathode Ray Tube*, 308 F.R.D. 606 (N.D. Cal.  
 14     2015), the court called an expert’s methodology “plausible,” but did not adopt a mere plausibility  
 15     analysis, and instead carefully examined that methodology. *Id.* at 629.

16      Plaintiffs’ claim that the Ninth Circuit in *Sali v. Corona Regional Medical Center*, 909  
 17     F.3d 996 (9th Cir. 2018), adopted a more lenient “plausibility” standard that silently overruled  
 18     the standards of *Ellis* is incorrect. To the contrary, the panel opinion in *Sali* reaffirmed that  
 19     *Ellis*—which held that a bare finding of admissibility under *Daubert* is insufficient to carry the  
 20     plaintiff’s burden<sup>1</sup>—continues to govern and to require district courts to assess the  
 21     persuasiveness of the proffered evidence:

22      Indeed, in evaluating challenged expert testimony in support of class certification,  
 23     a district court should evaluate admissibility under the standard set forth  
 24     in *Daubert*. *Ellis*, 657 F.3d at 982. But admissibility must not be dispositive.  
 25     Instead, an inquiry into the evidence’s ultimate admissibility should go to the  
 26     weight that evidence is given at the class certification stage. This approach accords  
 27     with our prior guidance that a district court should analyze the “persuasiveness of  
 28     the evidence presented” at the Rule 23 stage. *Id.*

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26      1 “However, the district court seems to have confused the *Daubert* standard it correctly applied to  
 27     Costco’s motions to strike with the ‘rigorous analysis’ standard” and “Instead of judging the  
 28     persuasiveness of the evidence presented, the district court seemed to end its analysis of the  
 29     plaintiffs’ evidence after determining such evidence was merely admissible.” *Ellis*, 657 F.3d at  
 30     982.

1 909 F.3d at 1006 (emphasis added). *Sali* and *Ellis* make clear that the test to be applied by this  
2 Court is not admissibility (or “more lenient plausibility”), but rather persuasiveness (of which  
3 admissibility is but a subordinate part).

If this Court were to conclude that *Sali* could not be thus harmonized with *Ellis*, it would be required to find that *Ellis* controls as it is well-settled that a later panel of the Ninth Circuit cannot—absent “intervening higher authority” that fatally undermines the prior precedent—depart from the law established by an earlier panel. *Al Ramahi v. Holder*, 725 F.3d 1133, 1138 n.2 (9th Cir. 2013); *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1106 (9th Cir. 2016) (Ikuta, J., dissenting) (citing *Al Ramahi* and noting the “most basic, fundamental principle” that prior panel decisions bind the Ninth Circuit absent intervening higher authority’); *Zitan Tech. LLC v. Yu*, Case No. 3:18-cv-00395-RCJ-WGC, 2019 WL 95779, at \*2 (D. Nev. Jan. 3, 2019) (“To the extent [the later panel opinion’s] interpretation of *Winter* is inconsistent with [the earlier panel’s opinion], [the earlier panel] should control”); *Evans v. Skolnik*, No. 3:08-cv-00353-RCJ-CBC, 2018 WL 5831213, at \*4 (D. Nev. Nov. 7, 2018) (“To the extent there were any inconsistency, the earlier case” would control); *Winnemucca Indian Colony v. U.S. ex rel. Dept. of the Interior*, 837 F. Supp. 2d 1184, 1189 (D. Nev. 2011) (same); *Quiroga v. Chen*, 735 F. Supp. 2d 1226, 1229 (D. Nev. 2010) (same).

**B. Plaintiffs' Arguments Regarding What Dr. Singer Must Show for Class Certification Are Contrary to Law and Should Be Rejected.**

19        Although the Court can take into account the fact that particular expert evidence is  
20      admissible under *Daubert*, courts have held that “opinion testimony should not be uncritically  
21      accepted as establishing a Rule 23 requirement merely because the court holds the testimony  
22      should not be excluded, under *Daubert* or for any other reason.” *In re Hydrogen Peroxide*  
23      *Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2009) (citation omitted). A conclusion that an  
24      expert’s testimony is admissible under *Daubert* therefore “does not preclude the Court from  
25      denying class certification.” *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412,  
26      417 (E.D. Pa. 2015); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 43  
27      (D.D.C. 2017); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 946 (C.D. Cal. 2015)

1 (“Admissibility [under *Daubert*] turns on whether [an expert’s] methodology is sufficiently  
 2 reliable; whether it satisfies *Comcast* and shows that a class should be certified is another  
 3 question altogether”), *aff’d sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir.  
 4 2017). On the other hand, it is difficult to see any circumstance in which expert testimony that  
 5 fails *Daubert*’s test of reliability could be sufficiently persuasive to carry a plaintiff’s burden.  
 6 *E.g., In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (“Expert testimony  
 7 that is insufficiently reliable to satisfy the *Daubert* standard cannot ‘prove’ that the Rule 23(a)  
 8 prerequisites have been met ‘in fact,’ nor can it establish ‘through evidentiary proof’ that Rule  
 9 23(b) is satisfied”).

10       In short, contrary to Plaintiffs’ arguments, the standard that this Court must apply  
 11 remains the demanding persuasiveness test of *Wal-Mart*, *Comcast*, and *Ellis* and not either of  
 12 the tests—mere admissibility or plausibility—for which Plaintiffs argue.

13           **II. Plaintiffs Mischaracterize The Holdings Of *Tyson* And *Amgen*.**

14       Plaintiffs’ brief wrongly contends that *Tyson* and *Amgen* stand for the proposition that a  
 15 plaintiff’s mere presentation of admissible evidence going to classwide impact necessarily  
 16 satisfies the Rule 23 standard. ECF No. 633 at 3. Section II of Zuffa’s opening brief showed  
 17 that this is not so. ECF No. 634 at 4-9. Plaintiffs also fail to explain how admissibility could  
 18 be the standard because classwide impact is an issue under Rule 23 for the Court to decide, and  
 19 is not one later considered by the jury.

20       In both *Comcast* and *Wal-Mart*, the Supreme Court held that concededly admissible  
 21 expert evidence was not sufficient to carry the plaintiffs’ burden under Rule 23, and *Tyson* did  
 22 not reverse their holdings. *Comcast*, 569 U.S. at 35-36; *Wal-Mart*, 564 U.S. at 356-57. Rather,  
 23 *Tyson* considered whether the Court should announce a “broad rule against the use in class  
 24 actions” of representative statistical evidence. 136 S. Ct. at 1046. The Court declined and  
 25 stated a narrow rule permitting a representative statistical sample to fill in an evidentiary gap  
 26 where individual plaintiffs would necessarily present the same evidence as the class. *Id.* at  
 27 1048; ECF No. 634 at 7-9. The Court distinguished the representative sample in *Tyson* (used to  
 28 establish the average time for putting on work clothes) from the statistical evidence in *Wal-Mart*

1 which was being used to establish a common policy of discrimination (or a common mode of  
 2 discretion) and could not have been used in an individual case to do so. 136 S. Ct. at 1047-48.

3 The Court concluded:

4       The Court reiterates that, while petitioner, respondents, or their  
 5 respective *amici* may urge adoption of broad and categorical rules governing the use  
 6 of representative and statistical evidence in class actions, this case provides no  
 7 occasion to do so. Whether a representative sample may be used to establish  
 8 classwide liability will depend on the purpose for which the sample is being  
 9 introduced and on the underlying cause of action. In FLSA actions, inferring the  
 10 hours an employee has worked from a study such as Mericle's has been permitted  
 11 by the Court so long as the study is otherwise admissible.

12       *Amgen* likewise does not stand for the proposition that because Plaintiffs' argument for  
 13 class certification rests solely on their expert's evidence, the antitrust injury allegedly suffered  
 14 by each member of the putative class necessarily rises and falls on this methodology and that  
 15 arguments challenging this methodology have no bearing on class certification.

16       ***First***, the argument misstates the holding in *Amgen*. In that case, the Court held that  
 17 plaintiffs need not prove materiality before a district court could certify a securities-fraud class  
 18 action because materiality is an objective issue, not one that turns on the particular plaintiff, and  
 19 therefore the relevant evidence is *necessarily the same for all class members*. 568 U.S. at 467.  
 20 Put differently, there could be no individualized evidence going to the issue and, therefore,  
 21 “there is no risk whatever that a failure of proof on the common question of materiality will  
 22 result in individual questions predominating”; the claims of all class members would simply  
 23 fail, together. *Id.* at 467-68. This case is unlike either *Amgen* or *Tyson*. Section IV of Zuffa's  
 24 Class Certification Opposition shows that this is instead a case in which Zuffa can and will  
 25 present individualized evidence relating to the differing facts and circumstances of each  
 26 member of the putative class. ECF 540 at 24-35. While it is true that Dr. Singer's methodology  
 27 fails for reasons that are globally applicable, Plaintiffs ignore the fact that, as shown at pages  
 28 27-28 of Zuffa's Class Certification Opposition (ECF No. 540), Dr. Singer's methodology fails  
 for the additional reason that it does not take into account the differences in market conditions  
 facing each member of the putative class—the analysis of which will necessitate mini-trials for

1 || each class member.

2           **Second**, Plaintiffs' position completely ignores the Supreme Court's repeated command  
3 (echoed by the Ninth Circuit) that trial courts must subject such expert testimony to "rigorous"  
4 examination and reject it if they deem it inadequately persuasive. This Court is not required to  
5 accept a fatally flawed expert opinion in determining issues reserved to the Court under Rule 23  
6 merely because such testimony would be fatally flawed for reasons that apply equally to all  
7 members of the putative class.

8 Plaintiffs' citation of *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL,  
9 2016 WL 5371856, at \*7 (D. Kan. Sept. 26, 2016), is similarly inapt. First, as was the case in  
10 *Tyson*, no *Daubert* challenge was raised, and the Court assumed the admissibility of expert  
11 evidence. *Id.* Second, there were no individualized defenses based on differing circumstances  
12 of putative class members at issue in that case.<sup>2</sup> *Id.* at \*8-9. Rather, the case turned on whether  
13 Syngenta's identical written representations to all putative class members were false and  
14 misleading, and all other elements, including the applicable duty of care, were subject to class-  
15 wide proof. *Id.* at \*4-5.

### **III. The Court’s Rulings On Class Certification Issues Will Not Bind A Later Jury.**

Plaintiffs suggest that, if this Court makes findings in the course of class certification proceedings, they would constitute the law of the case. Plaintiffs are wrong. None of the cases that Plaintiffs cite stand for that proposition. None even involved a class action. By contrast, Zuffa's opening brief cited a sampling of cases that directly address this issue and hold that such decisions have no preclusive effect. ECF No. 634 at 7. As the Fourth Circuit has written:

The district court's concern that Rule 23 findings might prejudice later process on the merits need not lead to the conclusion that such findings cannot be made. The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any fact differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment. A model for this process can be observed in the context of the preliminary injunction practice. Courts make factual findings in determining whether a preliminary injunction should issue, but those findings do

<sup>28</sup> 2 Unlike this case, *Syngenta* involved “a baseline set by a centralized commodities exchange and not a baseline set by a more informal market.” *Id.* at \*9.

1 not bind the jury adjudging the merits, and the jury's findings on the merits govern  
 2 the judgment to be entered in the case.

3 *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (citation omitted). The  
 4 Second Circuit agrees that "the determination as to a Rule 23 requirement is made only for  
 5 purposes of class certification and is not binding on the trier of facts, even if that trier is the  
 6 class certification judge." *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir.  
 7 2006) (citing *Gariety*, 368 F.3d at 366); *see id.* at 39 ("A trial judge's finding on a merits  
 8 issue *for purposes of a Rule 23 requirement* no more binds the court to rule for the plaintiff on  
 9 the ultimate merits of that issue than does a finding that the plaintiff has shown a probability of  
 10 success for purposes of a preliminary injunction"). So does the Fifth Circuit. *Unger v. Amedisys*  
 11 *Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) ("the court's determination for class certification  
 12 purposes may be revised (or wholly rejected) by the ultimate factfinder"). Furthermore,  
 13 Plaintiffs ignore clear guidance from the Supreme Court that an issue plaintiffs have proven at  
 14 the class certification stage nonetheless is an "issue they will surely have to prove *again* at trial  
 15 in order to make out their case on the merits." *Wal-Mart*, 564 U.S. at 351 n.6 (emphasis added).

16 Finally, in their opening brief, Plaintiffs include a list of generic "Proposed Findings"  
 17 that incorporate their incorrect (and ill-defined) interpretation of plausibility and other  
 18 misstatements of the Rule 23 standards. ECF No. 633 at 10. Zuffa disagrees that the Court  
 19 should make any of these findings as they are at odds with the binding law of the Supreme  
 20 Court and Ninth Circuit and, as Zuffa has explained at length in its Class Certification, *Daubert*,  
 21 and Summary Judgment briefing—and will further demonstrate at the upcoming evidentiary  
 22 hearings—Plaintiffs and their experts provide no basis for making these findings.

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1 Dated: January 23, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that the foregoing Zuffa, LLC's Responsive Brief  
3 Regarding the Standards to be Applied for the Evidentiary Hearing on Class Certification was  
4 served on January 23, 2019 via the Court's CM/ECF electronic filing system addressed to all  
5 parties on the e-service list.

/s/ Brent K. Nakamura

Brent K. Nakamura, an Employee of  
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